

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**IN RE: REALPAGE, INC., RENTAL
SOFTWARE ANTITRUST LITIGATION
(NO. II)**

Case No. 3:23-MD-3071

MDL No. 3071

This Document Relates to: ALL CASES

Chief Judge Waverly D. Crenshaw, Jr.

**DEFENDANTS' RESPONSE TO THE DEPARTMENT OF JUSTICE'S
MEMORANDUM OF LAW IN SUPPORT OF THE
STATEMENT OF INTEREST OF THE UNITED STATES**

INTRODUCTION

The Department of Justice's (DOJ) Statement of Interest (SOI) relies on allegations Plaintiffs do not make and arguments that defy controlling law. DOJ "merit[s] no special deference." *Repub. of Austria v. Altmann*, 541 U.S. 677, 701 (2004). And its SOI is not "particularly helpful or persuasive" given its novel legal theories based on factual allegations not present here. *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 296 F. Supp. 3d 959, 964 n.1 (S.D. Ind. 2017) (disregarding DOJ statement of interest). The Court should disregard the SOI.

I. DOJ Misstates Plaintiffs' Factual Allegations and Highlights Fatal Deficiencies

The Court need not reach DOJ's novel legal arguments because they depend on factual allegations Plaintiffs do not make. DOJ endorses a case Plaintiffs do not allege.¹

First, recognizing that "Section 1 applies to collaborations that *eliminate independent decisionmaking*," SOI at 1, 4, 6 (emphasis added), DOJ claims "[t]he key feature of the alleged scheme is that it eliminates separate pricing decisions by competing landlords...." *Id.* at 18. But DOJ is wrong. It bases this claim on its repeated assertion that "landlords using RealPage adopt RealPage's recommendations 80-90% of the time." *Id.* at 3, 13 (claiming "landlords ... overwhelmingly priced their units in line with RealPage's suggested prices (80-90%)"). This is *not* what Plaintiffs allege. They instead allege that Lessor Defendants "adopt RealPage RMS pricing *up to* 80%-90% of the time." Dkt. 530 ¶ 15 (emphasis added).² By dropping Plaintiffs' critical "up to" qualification, DOJ fundamentally alters Plaintiffs' allegations, which offer a *maximum*—not a minimum—acceptance rate. DOJ also ignores that at least some Lessor Defendants "had a low acceptance rate of RealPage's pricing recommendations, or high variance

¹ DOJ does not address the rule of reason. SOI at 3 n.3. It addresses only the *per se* rule.

² This allegation is contained only in the Multifamily Complaint; there is no such allegation in the Student Complaint.

rate.” *Id.* ¶ 286. Under Plaintiffs’ own allegations, some—or many—Lessor Defendants “adopt RealPage RMS pricing” a small fraction of the time, which necessarily concedes that Lessor Defendants make their own “separate pricing decisions” even after adopting any RealPage RMS—contrary to DOJ’s claim. Dkt. 593 at 5-6.

Thus, the “key feature” that DOJ emphasizes is required for a Section 1 violation is no feature of Plaintiffs’ allegations at all.³ This is fatal to their claims, as Plaintiffs do not aver that Lessor Defendants have “‘surrendered [their] freedom of action ... and agreed to abide by the will of’ RealPage as DOJ claims. SOI at 5-6 (quoting *Relevant Sports, LLC v. U.S. Soccer Fed’n, Inc.*, 61 F.4th 299, 309 (2d Cir. 2023)). Accepting pricing recommendations *only sometimes* does not support a plausible inference of horizontal conspiracy and is far removed from the cases DOJ cites. *See* SOI at 8-12 (repeatedly emphasizing need for “acceptance”).

Second, DOJ claims that “[t]he complaints allege that RealPage was clear about the purpose of its common pricing scheme: to increase prices above competitive levels through collaboration.” SOI at 3. But DOJ is wrong again. None of the alleged marketing statements by RealPage that DOJ cites says anything about *increasing prices*. *Id.* at 3-4. And DOJ ignores that RealPage explicitly advises users that its RMS may recommend price *decreases*. Dkt. 593 at 11. This directly refutes DOJ’s unsupported claim that Plaintiffs allege “a common understanding among the competitors that they would increase prices collectively by using RealPage.” SOI at 21. DOJ’s many-decades-old authorities are far removed from Plaintiffs’ actual allegations. Unlike in *Interstate Circuit* where the leading movie distributors received the *same* directive to raise their respective prices to the *same* specific minimum levels and did so at nearly the *same*

³ DOJ fails to cite the Student Complaint or cites inapposite paragraphs. SOI at 3-4, 14 (citing only Multifamily Complaint for alleged delegation of pricing decisions to RealPage); *id.* at 13 (citing Student Complaint ¶¶ 4-8 and 6-9 which do not support DOJ’s claim).

time,⁴ or *Goldfarb* where lawyers agreed to a “minimum-fee schedule,”⁵ or *Flat Glass* where the defendants agreed to the *same* list prices,⁶ or *Meyer* where drivers agreed to charge the *same* prices set by the same software app,⁷ or any of DOJ’s similar citations, here Plaintiffs do not allege that any Lessor Defendant ever received—*much less adopted*—the same or even similar pricing recommendations from any RealPage RMS as any competing Lessor Defendant at *any* time. This is fatal to Plaintiffs’ claims—just as the court recently held in *Gibson v. MGM Resorts International*, 2023 WL 7025996, at *3 (D. Nev. Oct. 24, 2023). Dkt. 639 at 2, 6. Lacking any rebuttal to *Gibson*, DOJ simply ignores it and relies on inapposite cases.⁸

II. DOJ Misstates the Controlling Law of Conspiracy

To state a claim under Section 1, Plaintiffs must “plead an agreement in restraint of trade.” *C.S. Sewell, M.D. P.C. v. Amerigroup Tenn., Inc.*, 2018 WL 6591429, at *3 (M.D. Tenn. Dec. 14, 2018) (Crenshaw, J.); *see also James R. Snyder Co. v. Assoc. Gen. Contractors of Am.*, 677 F.2d 1111, 1121 (6th Cir. 1982) (defining “concerted action” as “agreement by parties to act together”). To do so, Plaintiffs must specifically allege a “conscious commitment to a common scheme designed to achieve an unlawful objective”—the controlling standard for establishing unlawful “concerted action,” which DOJ ignores and attempts to obviate with novel arguments. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). And Plaintiffs’ specific factual allegations must “point[] toward a meeting of the minds.” *Bell Atlantic Corp. v.*

⁴ *Interstate Circuit v. United States*, 306 U.S. 208, 226-27 (1939).

⁵ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 782-83 (1975).

⁶ *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 362-63 (3d Cir. 2004).

⁷ *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824-25 (S.D.N.Y. 2016).

⁸ DOJ relies heavily on *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), which Plaintiffs do not cite at all—and for good reason. SOI at 1, 4-5, 7-8, 12, 14, 15, 18. The question there was not the existence of an agreement—there was a signed contract—but rather whether the parties to that explicit agreement were a “single enterprise.” 560 U.S. at 189. This has no bearing here. And DOJ “may not raise additional issues or arguments not raised by the parties” in any event. *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 560 (6th Cir. 2016).

Twombly, 550 U.S. 544, 557 (2007). To the extent DOJ suggests otherwise, it is wrong.

Citing *Interstate Circuit*, DOJ argues that a mere “invitation proposing collective action followed by a course of conduct showing acceptance suffices to show concerted action.” SOI at 9. But Section 1 requires more, as *Interstate Circuit* confirms. As the Sixth Circuit emphasized in *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009), the “evidence of unlawful collusion” in *Interstate Circuit* involved a “movie theater chain sen[ding] an identical letter to eight major movie distributors” that “listed all eight distributors as addressees” and demanding that they require all second-run theaters to charge no less than 25 cents. *Id.* at 906. “Soon thereafter,” the distributors took “substantially unanimous action” by instituting a 25-cent minimum-price policy—despite a “risk of substantial loss” if they acted unilaterally. *Id.* at 906, 906 n.6. This is very different from the allegations here where RealPage has publicly marketed various RMS for *many years to countless* lessors nationwide that recommend both price increases and *decreases* for any given lessor’s specific unit at any moment in time—and where each Lessor Defendant agreed *with RealPage at different times over many years* to license one or more of those tools while continuing to make “separate pricing decisions” by rejecting RealPage RMS recommendations, which at least some Lessor Defendants did often. Dkt. 593 at 11, 15. And Plaintiffs do not allege that Defendants know who each of the other RealPage RMS users is or what price recommendations other RealPage RMS users receive, unlike in *Interstate Circuit*. Plaintiffs’ alleged conspiracy is a far cry from the facts of *Interstate Circuit*, which highlights the implausibility.

DOJ further attempts to dilute the legal standard and Plaintiffs’ burden by arguing that Plaintiffs need not allege parallel conduct or “plus factors” to plead circumstantial evidence of

the alleged conspiracy. SOI at 8-9. This too is wrong.⁹ When relying on circumstantial evidence, “a plaintiff *must* provide ‘plus factors’ to support plaintiff’s allegation that the actions of the Defendants are not independent.” *Hobart-Mayfield, Inc. v. Nat’l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 665-66 (6th Cir. 2022) (emphasis added). DOJ again misstates *Interstate Circuit*, SOI at 8-12, which—again—involved parallel, near-simultaneous, identical price increases. And as the Sixth Circuit emphasized in *Travel Agent*, far from obviating the plus-factor analysis, *Interstate Circuit*’s facts correspond directly to several plus factors, such as actions “contrary to . . . economic self-interest,” “uniform . . . actions” among defendants, and information exchanges “relative to the alleged conspiracy.” 583 F.3d at 907 (quotation omitted). And while there was “no alternative reason for their parallel pricing demands” in *Interstate Circuit*, *id.* at 906, Plaintiffs acknowledge legitimate independent reasons for using RealPage RMS. Dkt. 593 at 2, 6, 11-13. DOJ simply ignores these inconvenient facts.

Lastly, DOJ misstates the law on direct evidence, arguing it “need not be tantamount to an acknowledgement of guilt.” SOI at 12. This contradicts controlling precedent. *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (“[D]irect evidence is ‘tantamount to an acknowledgement of guilt.’” (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002))). The Sixth Circuit controls here, not DOJ’s novel arguments.

CONCLUSION

DOJ’s “Statement of Interest” is not a fair or accurate statement of the law or Plaintiffs’ allegations. It reflects an attempt to expand the Sherman Act beyond the boundaries of well-established and controlling antitrust jurisprudence. The Court should reject this.

⁹ DOJ does not even try to defend Plaintiffs’ “parallel conduct” allegations or arguments. SOI at 14 n.8. The SOI, thus, is wholly inapplicable to Student Plaintiffs’ claims, which rely *only* on alleged parallel conduct and plus factors. *See* Dkt. 617 at 5-24.

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Respectfully submitted,

/s/ David D. Cross

David D. Cross (admitted *pro hac vice*)
dcross@mofo.com
Jeffrey A. Jaeckel (admitted *pro hac vice*)
jjaeckel@mofo.com
Robert W. Manoso (admitted *pro hac vice*)
rmanoso@mofo.com
MORRISON & FOERSTER LLP
2100 L Street, NW, Suite 900
Washington, D.C., 20037
Telephone: (202) 887-1500

Eliot A. Adelson (admitted *pro hac vice*)
eadelson@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

Mika M. Fitzgerald (admitted *pro hac vice*)
mfitzgerald@mofo.com
MORRISON & FOERSTER LLP
250 W 55th Street
New York, NY 10019
Telephone: (212) 468-8000

/s/ Joshua L. Burgener

Joshua L. Burgener
jburgener@dickinsonwright.com
DICKINSON WRIGHT PLLC
424 Church Street, Suite 800
Nashville, TN 37219
Telephone: (615) 620-1757

Counsel for Defendant UDR, Inc.

/s/ Jay Srinivasan

Jay Srinivasan (admitted *pro hac vice*)
jsrinivasan@gibsondunn.com
Daniel G. Swanson (admitted *pro hac vice*)
dswanson@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7430

Stephen Weissman (admitted *pro hac vice*)
sweissman@gibsondunn.com
Michael J. Perry (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 955-8678

Stephen C. Whittaker (admitted *pro hac vice*)
cwhittaker@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1361 Michelson Drive
Irvine, CA 92612
Telephone: (212) 351-2671

Ben A. Sherwood (admitted *pro hac vice*)
bsherwood@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 351-2671

Thomas H. Dundon (SBN: 004539)
tdundon@nealharwell.com
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203
Telephone: (615) 244-1713

Counsel for Defendant RealPage, Inc.

/s/ Danny David

Danny David
danny.david@bakerbotts.com
BAKER BOTTS LLP
910 Louisiana Street
Houston, TX 77002
Telephone: (713) 229-4055

James Kress (*pro hac vice* forthcoming)
james.kress@bakerbotts.com
Paul Cuomo (*pro hac vice* forthcoming)
paul.cuomo@bakerbotts.com
BAKER BOTTS LLP
700 K. Street, NW
Washington, DC 20001
Telephone: (202) 639-7884

John R. Jacobson (#14365)
jjacobson@rjfirm.com
Milton S. McGee, III (#24150)
tmcgee@rjfirm.com
RILEY & JACOBSON, PLC
1906 West End Avenue
Nashville, TN 37203
Telephone: (615) 320-3700

*Counsel for Defendant Avenue5 Residential,
LLC*

/s/ Ian Simmons

Ian Simmons
isimmons@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
Telephone: (202) 383-5196

Stephen McIntyre
smcintyre@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
Telephone: (213) 430-6000

*Counsel for Defendants BH Management
Services, LLC, B.HOM Student Living LLC,
and TREV Management II LLC*

/s/ Marguerite Willis

Marguerite Willis (admitted *pro hac vice*)
mwillis@maynardnexsen.com
MAYNARD NEXSEN PC
104 South Main Street
Greenville, SC 29601
Telephone: (864) 370-2211

Michael A. Parente (admitted *pro hac vice*)
mparente@maynardnexsen.com
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, SC 29201
Telephone: (803) 771-8900

Margaret M. Siller (BPR No. 039058)
msiller@maynardnexsen.com
MAYNARD NEXSEN PC
1131 4th Avenue South, Suite 320
Nashville, Tennessee 37210
Telephone: (629) 258-2253

Counsel for Defendant Bell Partners, Inc.

/s/ Edwin Buffmire

Edwin Buffmire
ebuffmire@jw.com
Michael Moran
mmoran@jw.com
JACKSON WALKER LLP
2323 Ross Ave., Suite 600
Dallas, TX 75201
Telephone: (214) 953-6000

*Counsel for Defendants Trammell Crow
Residential Company and Crow Holdings, LP*

/s/ James D. Bragdon

James D. Bragdon
jbragdon@gejlaw.com
Sam Cowin
scowin@gejlaw.com
GALLAGHER EVELIUS & JONES LLP
218 N. Charles St., Suite 400
Baltimore, MD 21201
Telephone: (410) 727-7702

Philip A. Giordano (admitted *pro hac vice*)
philip.giordano@hugheshubbard.com
HUGHES HUBBARD & REED LLP
1775 I Street NW
Washington, DC 20007
Telephone: (202) 721-4776

Charles E. Elder, BPR # 038250
celder@bradley.com
BRADLEY ARANTBOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, Tennessee 37203
P: 615.252.3597

*Counsel for Defendant
Bozzuto Management Company*

/s/ Yehudah L. Buchweitz

Yehudah L. Buchweitz
yehudah.buchweitz@weil.com
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8256

Jeff L. White
jeff.white@weil.com
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW
Washington, DC 20036
Telephone: (202) 682-7059

R. Dale Grimes, BPR #006223
dgrimes@bassberry.com
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Telephone: (615) 742-6244

*Counsel for Defendant Brookfield Properties
Multifamily LLC*

/s/ Danielle R. Foley

Danielle R. Foley (admitted *pro hac vice*)
drfoley@venable.com
Andrew B. Dickson (admitted *pro hac vice*)
abdickson@venable.com
Victoria L. Glover (admitted *pro hac vice*)
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 344-4300

*Counsel for Defendant CH Real Estate
Services, LLC*

/s/ Benjamin R. Nagin

Benjamin R. Nagin
bnagin@sidley.com
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300

*Counsel for Defendant ConAm Management
Corporation*

/s/ Lynn H. Murray

Lynn H. Murray
lhmurray@shb.com
Maveric Ray Searle
msearle@shb.com
SHOOK, HARDY & BACON L.L.P.
111 S. Wacker Dr., Suite 4700
Chicago, IL 60606
Telephone: (312) 704-7766

Ryan Sandrock
rsandrock@shb.com
Shook, Hardy & Bacon L.L.P.
555 Mission Street, Suite 2300
San Francisco, CA 94105
Telephone: (415) 544-1944

Laurie A. Novion
lnovion@shb.com
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
Telephone: (816) 559-2352

Counsel for Defendant Camden Property Trust

/s/ Ronald W. Breaux

Ronald W. Breaux
Ron.Breaux@haynesboone.com
Bradley W. Foster
Brad.Foster@haynesboone.com
HAYNES AND BOONE LLP
2801 N. Harwood Street, Suite 2300
Dallas, TX 75201
Telephone: (214) 651-5000
Fax: (214) 200-0376

*Counsel for Defendant CONTI Texas
Organization, Inc. d/b/a CONTI Capital*

/s/ Kenneth Reinker

Kenneth Reinker
kreinker@cgsh.com
CLEARY GOTTlieb STEEN & HAMILTON LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: (202) 974-1522

Joseph M. Kay
jkay@cgsh.com
CLEARY GOTTlieb STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
Telephone: (212) 225-2745

*Counsel for Defendant Pinnacle Property
Management Services, LLC*

/s/ Todd R. Seelman

Todd R. Seelman
todd.seelman@lewisbrisbois.com
Thomas L. Dyer
thomas.dyer@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
1700 Lincoln Street, Suite 4000
Denver, CO 80203
Telephone: (720) 292-2002

*Counsel for Defendant Cortland Management,
LLC*

/s/ Ann MacDonald

Ann MacDonald
Ann.macdonald@afslaw.com
Barry Hyman
Barry.hyman@afslaw.com
ARENTFOX SCHIFF LLP
233 South Wacker Drive, Suite 7100
Chicago, IL 60606
Telephone: (312) 258-5500

*Counsel for Defendant CWS Apartment Homes,
LLC*

/s/ Bradley C. Weber

Bradley C. Weber (admitted *pro hac vice*)
bweber@lockelord.com
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201
Telephone: (214) 740-8497

*Counsel for Defendant Dayrise Residential,
LLC*

/s/ Charles H. Samel

Charles H. Samel
charles.samel@stoel.com
Edward C. Duckers
ed.duckers@stoel.com
STOEL RIVES LLP
1 Montgomery Street, Suite 3230
San Francisco, CA 94104
Telephone: (415) 617-8900

George A. Guthrie
gguthrie@wilkefleury.com
WILKE FLEURY LLP
621 Capitol Mall, Suite 900
Sacramento, CA 95814
Telephone: (916) 441-2430

Counsel for Defendant FPI Management, Inc.

/s/ Carl W. Hittinger

Carl W. Hittinger
chittinger@bakerlaw.com
Alyse F. Stach
astach@bakerlaw.com
Tyson Y. Herrold
therrold@bakerlaw.com
BAKER & HOSTETLER LLP
1735 Market Street, Suite 3300
Philadelphia, PA 19103-7501
Telephone: (215) 568-3100

Stephen J. Zralek, BPR #018971
szralek@spencerfane.com
S. Chase Fann, BPR #036794
cfann@spencerfane.com
SPENCER FANE LLP
511 Union Street, Suite 1000
Nashville, TN 37219
Telephone: (615) 238-6300

Counsel for Defendant Equity Residential

/s/ Leo D. Caseria

Leo D. Caseria
lcaseria@sheppardmullin.com
Helen C. Eckert
heckert@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue, NW, Suite 100
Washington, DC, 20006
Telephone: (202) 747-1925

Arman Oruc
aoruc@goodwinlaw.com
GOODWIN PROCTER, LLP
1900 N Street, NW
Washington, DC 20036
Telephone: (202) 346-4000

Counsel for Defendant Essex Property Trust, Inc.

/s/ Michael D. Bonanno

Michael D. Bonanno (admitted *pro hac vice*)
mikebonanno@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN LLP
1300 I St. NW, Suite 900
Washington, DC 20005
Telephone: (202) 538-8225

Christopher Daniel Kercher (admitted *pro hac vice*)
christopherkercher@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue, 22nd Floor,
New York, New York 10010
Telephone: (212) 849-7000

Andrew Gardella, Esq. (TN Bar #027247)
agardella@martintate.com
MARTIN, TATE, MORROW & MARSTON P.C.
315 Deaderick Street, Suite 1550
Nashville, TN 37238
Telephone: (615) 627-0668

Counsel for Defendant Highmark Residential, LLC

/s/ Cliff A. Wade

Cliff A. Wade
cliff.wade@bakerlopez.com
Chelsea L. Futrell
chelsea.futrell@bakerlopez.com
BAKER LOPEZ PLLC
5728 LBJ Freeway, Suite 150
Dallas, Texas 75240
Telephone: (469) 206-9384

Counsel for Defendant Knightvest Residential

/s/ Michael M. Maddigan

Michael M. Maddigan
michael.maddigan@hoganlovells.com
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 785-4727

William L. Monts, III
william.monts@hoganlovells.com
Benjamin F. Holt
benjamin.holt@hoganlovells.com
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-6440

Joshua C. Cumby (BPR No. 37949)
joshua.cumby@arlaw.com
F. Laurens Brock (BPR No. 17666)
larry.brock@arlaw.com
Rocklan W. King, III (BPR No. 30643)
rocky.king@arlaw.com
ADAMS AND REESE LLP
1600 West End Avenue, Suite 1400
Nashville, Tennessee 37203
Telephone: (615) 259-1450

Counsel for Defendant Greystar Management Services, LLC

/s/ Gregory J. Casas

Gregory J. Casas (admitted *pro hac vice*)
casasg@gtlaw.com
Emily W. Collins (admitted *pro hac vice*)
Emily.Collins@gtlaw.com
GREENBERG TRAURIG,LLP
300 West 6th Street, Suite 2050
Austin, TX 78701-4052
Telephone: (512) 320-7200

Robert J. Herrington (admitted *pro hac vice*)
Robert.Herrington@gtlaw.com
GREENBERG TRAURIG,LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: (310) 586-7700

Becky L. Caruso (admitted *pro hac vice*)
Becky.Caruso@gtlaw.com
GREENBERG TRAURIG,LLP
500 Campus Drive, Suite 400
Florham Park, NJ 07932
Telephone: (973) 443-3252

/s/ Ryan T. Holt

Ryan T. Holt (No. 30191)
rholt@srvhlaw.com
Mark Alexander Carver (No. 36754)
acarver@srvhlaw.com
SHERRARD ROE VOIGT & HARBISON, PLC
150 Third Avenue South, Suite 1100
Nashville, Tennessee 37201
Tel. (615) 742-4200

*Counsel for Defendant Lincoln Property
Company*

/s/ John J. Sullivan

John J. Sullivan (admitted *pro hac vice*)
jsullivan@cozen.com
COZEN O'CONNOR P.C.
3 WTC, 175 Greenwich St., 55th Floor
New York, NY 10007
Telephone: (212) 453-3729

Molly Rucki (admitted *pro hac vice*)
mrucki@cozen.com
COZEN O'CONNOR P.C.
1200 19th St. NW, Suite 300
Washington, DC 20036
Telephone: (202) 912-4884

*Counsel for Defendant Independence Realty
Trust, Inc.*

/s/ Eliot Turner

Eliot Turner
eliot.turner@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
1301 McKinney, Suite 5100,
Houston, Texas 77010
Telephone: (713) 651-5151

*Counsel for Defendant Kairoi Management,
LLC*

/s/ Michael W. Scarborough

Michael W. Scarborough (admitted *pro hac vice*)

mscarborough@velaw.com

Dylan I. Ballard (admitted *pro hac vice*)

dballard@velaw.com

VINSON & ELKINS LLP

555 Mission Street, Suite 2000

San Francisco, CA 94105

Telephone: (415) 979-6900

Counsel for Defendant Lantower Luxury Living, LLC

/s/ Britt M. Miller

Britt M. Miller (admitted *pro hac vice*)

bmiller@mayerbrown.com

Daniel T. Fenske (admitted *pro hac vice*)

dfenske@mayerbrown.com

Matthew D. Provance (admitted *pro hac vice*)

mprovance@mayerbrown.com

MAYER BROWN LLP

71 South Wacker Drive

Chicago, IL 6006

Telephone: (312) 701-8663

Scott D. Carey (#15406)

scarey@bakerdonelson.com

Ryan P. Loofbourrow (#33414)

rloofbourrow@bakerdonelson.com

BAKER, DONELSON, BEARMAN, CALDWELL &
BERKOWITZ, P.C.

1600 West End Avenue, Suite 2000

Nashville, TN 37203

Telephone: (615) 726-5600

*Counsel for Defendants Mid-America
Apartment Communities, Inc. and Mid-America
Apartments, L.P.*

/s/ Judith A. Zahid

Judith A. Zahid (admitted *pro hac vice*)

jzahid@zellelaw.com

Heather T. Rankie (admitted *pro hac vice*)

hrankie@zellelaw.com

ZELLE LLP

555 12th Street, Suite 1230

Oakland, CA 94607

Telephone: (415) 633-1916

Counsel for Defendant Prometheus Real Estate Group, Inc.

/s/ Jeffrey C. Bank

Jeffrey C. Bank
jbank@wsgr.com
WILSON SONSINI GOODRICH & ROSATI PC
1700 K Street NW, Fifth Floor
Washington, DC 20006
Telephone: (202) 973-8800

*Counsel for Defendant Morgan Properties
Management Company, LLC*

/s/ Richard P. Sybert

Richard P. Sybert (WSBA No. 8357)
rsybert@grsm.com
GORDON REES SCULLY MANSUKHANI
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
Telephone: (206) 321-5222

*Counsel for Defendant Rose Associates Inc.
and First Communities Management, Inc.*

/s/ Valentine Hoy

Valentine Hoy
vhoy@allenmatkins.com
Scott Perlin
sperlin@allenmatkins.com
ALLEN MATKINS LECK GAMBLE MALLORY &
NATSIS
600 West Broadway, 27th Floor
San Diego, CA 92101
Telephone: (619) 233-1155

Patrick E. Breen
pbreen@allenmatkins.com
ALLEN MATKINS LECK GAMBLE MALLORY &
NATSIS
865 South Figueroa Street, Suite 2800
Los Angeles, CA 90017
Telephone: (213) 622-5555

*Counsel for Defendant Sares Regis Group
Commercial, Inc.*

/s/ Jose Dino Vasquez

Jose Dino Vasquez
dvasquez@karrtuttle.com
Jason Hoeft
jhoeft@karrtuttle.com
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
Telephone: (206) 223-1313

*Counsel for Defendant Security Properties
Residential, LLC*

/s/ David A. Walton

David A. Walton
dwalton@bellnunnally.com
Troy Lee (T.J.) Hales
thales@bellnunnally.com
BELL NUNNALLY & MARTIN, LLP
2323 Ross Avenue, Suite 1900
Dallas, TX 75201

Counsel for Defendant RPM Living, LLC

/s/ Diane R. Hazel

Diane R. Hazel
dhazel@foley.com
FOLEY & LARDNER LLP
1400 16th Street, Suite 200
Denver, CO 80202
Telephone: (720) 437-2000

Elizabeth A. N. Haas (admitted *pro hac vice*)
ehaas@foley.com
Ian Hampton (admitted *pro hac vice*)
ihampton@foley.com
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 271-2400

Tara L. Swafford, BPR #17577
tara@swaffordlawfirm.com
Dylan Harper, BPR #36820
dylan@swaffordlawfirm.com
THE SWAFFORD LAW FIRM, PLLC
321 Billingsly Court, Suite 19
Franklin, Tennessee 37067
Telephone: (615) 599-8406

*Counsel for Defendant Sherman Associates,
Inc.*

/s/ Brent Justus

Brent Justus
bjustus@mcguirewoods.com
Nick Giles
ngiles@mcguirewoods.com
McGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219-3916
Telephone: (804) 775-1000

*Counsel for Defendant Simpson Property
Group, LLC*

/s/ Yonaton Rosenzweig

Yonaton Rosenzweig
yonirosenzweig@dwt.com
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, CA 90017

Fred B. Burnside
fredburnside@dwt.com
MaryAnn T. Almeida
maryannalmeida@dwt.com
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104
Telephone: (206) 757-8016

*Counsel for Defendant Mission Rock
Residential, LLC*

/s/ Andrew Harris

Andrew Harris
Andrew.Harris@Levittboccio.com
LEVITT & BOCCIO, LLP
423 West 55th Street
New York, NY 10019
Telephone: (212) 801-1104

/s/ Nicholas A. Gravante, Jr.

Nicholas A. Gravante, Jr. (admitted *pro hac vice*)
nicholas.gravante@cwt.com
Philip J. Iovieno (admitted *pro hac vice*)
philp.iovieno@cwt.com
CADWALADER, WICKERSHAM & TAFT LLP
200 Liberty Street
New York, NY 10281
Telephone: (212) 504-6000

*Counsel for Defendants The Related
Companies, L.P. and Related Management
Company, L.P.*

/s/ Benjamin I. VandenBerghe

Benjamin I. VandenBerghe
biv@montgomerypurdue.com
Kaya R. Lurie
klurie@montgomerypurdue.com
MONTGOMERY PURDUE PLLC
701 Fifth Avenue, Suite 5500
Seattle, Washington 98104-7096

*Counsel for Defendant Thrive Communities
Management, LLC*

/s/ Edwin Buffmire

Edwin Buffmire
ebuffmire@jw.com
Michael Moran
mmoran@jw.com
JACKSON WALKER LLP
2323 Ross Ave., Suite 600
Dallas, TX 75201
Telephone: (214) 953-6000

Kevin Fulton
kevin@fultonlg.com
THE FULTON LAW GROUP PLLC
7676 Hillmont St., Suite 191
Houston, TX 77040
Telephone: (713) 589-6964

*Counsel for Defendant Allied Orion Group,
LLC*

/s/ Katie A. Reilly

Katie A. Reilly
reilly@wtotrial.com
Michael T. Williams
williams@wtotrial.com
Judith P. Youngman
youngman@wtotrial.com
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
Telephone: (303) 244-1800

Mark Bell
Mark.Bell@hklaw.com
HOLLAND & KNIGHT LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219
Telephone: (615) 850-8850

*Counsel for Defendant Apartment Income
REIT Corp., d/b/a AIR Communities*

/s/ Craig Seebald

Jessalyn H. Zeigler
jzeigler@bassberry.com
BASS, BERRY & SIMS, PLC
150 Third Avenue South
Suite 2800
Nashville, TN 37201
Telephone: (615) 742-6200

Craig P. Seebald (admitted *pro hac vice*)
cseebald@velaw.com
Stephen M. Medlock (admitted *pro hac vice*)
smedlock@velaw.com
Molly McDonald
mmcdonald@velaw.com
VINSON & ELKINS LLP
2200 Pennsylvania Ave., N.W.
Suite 500 West
Washington, D.C. 20037
Telephone: (202) 639-6500

Christopher W. James (admitted *pro hac vice*)
cjames@velaw.com
VINSON & ELKINS LLP
555 Mission Street
Suite 2000
San Francisco, CA 94105
Telephone: (415) 979-6900

*Counsel for Defendant Windsor Property
Management Company*

/s/ Evan Fray-Witzer

Evan Fray-Witzer
Evan@CFWLegal.com
CIAMPA FRAY-WITZER, LLP
20 Park Plaza, Suite 505
Boston, MA 02116
Telephone: 617-426-0000

*Counsel for Defendants WinnCompanies LLC,
and WinnResidential Manager Corp.*

/s/ Ferdose al-Taie

Ferdose al-Taie (admitted *pro hac vice*)
faltaie@bakerdonelson.com
BAKER, DONELSON, BEARMAN CALDWELL &
BERKOWITZ, P.C.
956 Sherry Lane, 20th Floor
Dallas, TX 75225
Telephone: (214) 391-7210

Christopher E. Thorsen (BPR # 21049)
cthorsen@bakerdonelson.com
BAKER, DONELSON, BEARMAN CALDWELL &
BERKOWITZ, P.C.
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, TN 37201
Telephone: (615) 726-5600

Counsel for Defendant ZRS Management, LLC

/s/ James H. Mutchnik

James H. Mutchnik
james.mutchnik@kirkland.com
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000

*Counsel for Defendants Thoma Bravo L.P.,
Thoma Bravo Fund XIII, L.P., and Thoma
Bravo Fund XIV, L.P.*

/s/ Jeffrey S. Cashdan

Jeffrey S. Cashdan (admitted *pro hac vice*)
jcashdan@kslaw.com
Emily S. Newton (admitted *pro hac vice*)
enewton@kslaw.com
Lohr A. Beck (admitted *pro hac vice*)
lohr.beck@kslaw.com
Carley H. Thompson (admitted *pro hac vice*)
chthompson@kslaw.com
KING & SPALDING LLP
1180 Peachtree Street, NE, Suite 1600
Atlanta, Georgia 30309
Telephone: (404) 572-4600

Counsel for Defendant ECI Management, LLC

/s/ Sarah B. Miller

Sarah B. Miller (TN#33441)
smiller@bassberry.com
BASS, BERRY & SIMS PLC
150 Third Ave. South #2800
Nashville, TN 37201
Telephone: (615) 742-6200

Amy F. Sorenson (*pro hac vice* forthcoming)
asorenson@swlaw.com
SNELL & WILMER, L.L.P.
15 West South Temple, Ste. 1200
Salt Lake City, UT 84101
Telephone: (801) 257-1900

Colin P. Ahler (*pro hac vice* forthcoming)
cahler@swlaw.com
SNELL & WILMER, L.L.P.
One East Washington St., Ste. 2700
Phoenix, AZ 85004
Telephone: (602) 382-6000

*Counsel for Defendant Apartment
Management Consultants, LLC*

/s/ Marisa Secco Giles

Marisa Secco Giles
mgiles@velaw.com
VINSON & ELKINS LLP
200 West 6th Street, Suite 2500
Austin, Texas 78701
Telephone: (512) 542-8781

Jason M. Powers
jpowers@velaw.com
VINSON & ELKINS LLP
845 Texas Avenue, Suite 4700
Houston, Texas 77002
Telephone: (713) 758-2522

/s/ Samuel P. Funk

Samuel P. Funk (#19777)
sfunk@simsfunk.com
Grace A. Fox (#37367)
gfox@simsfunk.com
SIMS FUNK, PLC
3322 West End Ave., Ste. 200
Nashville, TN 37203
Telephone: (615) 292-9335

*Counsel for Defendant Campus Advantage,
Inc.*

/s/ Timothy R. Beyer

Timothy R. Beyer
tim.beyer@bclplaw.com
BRYAN CAVE LEIGHTON PAISNER LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Telephone: (303) 866-0481

Sarah Hartley
sarah.hartley@bclplaw.com
BRYAN CAVE LEIGHTON PAISNER LLP
1155 F Street, N.W.
Washington, DC 20004
Telephone: (303) 866-0363

/s/ Samuel P. Funk

Samuel P. Funk (#19777)
sfunk@simsfunk.com
Grace A. Fox (#37367)
gfox@simsfunk.com
SIMS FUNK, PLC
3322 West End Ave., Ste. 200
Nashville, TN 37203
Telephone: (615) 292-9335

*Counsel for Defendant Cardinal Group
Holdings LLC*

/s/ Michael F. Murray

Michael F. Murray
michaelmurray@paulhastings.com
PAUL HASTINGS LLP
2050 M Street, NW
Washington, DC 20036
Telephone: (202) 551-1730

Noah Pinegar
noahpinegar@paulhastings.com
PAUL HASTINGS LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 318-6057

/s/ Samuel P. Funk

Samuel P. Funk (#19777)
sfunk@simsfunk.com
Grace A. Fox (#37367)
gfox@simsfunk.com
SIMS FUNK, PLC
3322 West End Ave., Ste. 200
Nashville, TN 37203
Telephone: (615) 292-9335

*Counsel for Defendant CA Student Living
Operating Company, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

/s/ David Cross

David Cross